Any later law passed with the avowed object of ameliorating the financial position of pensioners and their dependants cannot be withheld from any group of pensioners and their dependants just because they are non-resident. This later law – the Pensions Adjustment Act 1980 – is applicable to the pension of the plaintiff in this case. Any attempt to deprive him from the benefits of this law will amount to an arbitrary and unfair discrimination inconsistent with Article 8(1) and Article 147 of the Federal Constitution. Pensioners are a diminishing race. They have given the best years of their lives in the service of the country. And now in their twilight years we cannot deprive the pensioners who left the country of the additional benefits that we are giving to those who are resident in Malaysia. It is just not fair.

In the circumstances therefore I find that the classification of residents and non-resident pensioners is not based on an intelligible differentia and that the differentia is wholly unrelated to the object of the Pensions Adjustment Act 1980. The classification offends Article 8(1) of the Federal Constitution and has to be declared void. I accordingly declare that the provision in section 1(2) of the Pensions Adjustment Act 1980 which restricts the application of the Act to residents in Malaysia is void and of no effect. The plaintiff's claim is allowed with costs. His pension is to be adjusted in accordance with the provisions of the Pensions Adjustment Act 1980 and arrears together with 8% interest per annum to be calculated on a yearly basis paid to him. In exercising my discretion in allowing interest I took into consideration the fact that the plaintiff was kept away from his just dues despite his claim made to the Pensions Department by letter dated July 12, 1980 just over a month from the date when the Pensions Adjustment Act 1980 came into force.

Order accordingly.

Solicitors: *G. T. Rajan & Co.*

PONTIAN BAS BERHAD v. PUBLIC PROSECUTOR

[A.Cr. J. (L.C. Vohrah J.) July 25, 1987]

[Johor Bahru – Criminal Appeal No. 100 of 1985]

Employees Provident Fund – Employer failing to remit contribution to Employees Provident Fund Board – Charged in court and fined – Fine paid – Order against manager to pay arrears of contributions – Failure to pay – Committal order against manager – Whether committal order proper – Employees Provident Fund Act 1951, s.16A(1)(c) & (4).

Criminal Law and Procedure – Sentence of a fine – Fine paid – Arrears of contributions to Employee Provident Fund Board – Committal order against manager of employer for failure to pay – Arrears not imposed as a fine – Whether committal order should be set aside – Criminal Procedure Code (F.M.S. Cap. 6), s. 283(i)(b)(4) & (c).

Provident Fund – Arrears – Order against manager to pay arrears of contributions – Civil debt and not by way of penalty – Committal order set aside.

On October 15, 1984, the appellant-company was charged under section 16A(1)(c) of the Employees Provident Fund Act 1951 for failing as an employer to remit contributions in respect of certain employees. Its manager pleaded guilty to all the charges. The magistrate imposed fines in the total sum of $4,320 which was paid. The magistrate also ordered the appellant-company to pay to the Board arrears of contributions amounting to $28,325 by December 15, 1984. The manager failed to do so and eventually on October 18, 1986, the magistrate made the order committing him to 10 months' imprisonment for failing to pay the arrears. The appellant-company appealed. The question for decision is whether the manager can be imprisoned for his failure to pay the arrears of contributions owed to the Board by the appellant-company.

Held, allowing the appeal: (1) the specific provisions of section 283(i)(b)(4) and (c) of the Criminal Procedure Code prescribe imprisonment in case of default of payment of a fine imposed as punishment for a particular offence. These specific provisions cannot apply to arrears of contributions upon certification because they were not fines as such;

(2) the arrears of contribution by their very nature constitute a civil debt and were not ordered to be paid by way of a penalty. The order of committal made by the learned Magistrate should accordingly be set aside.

Case referred to:

(1) *Public Prosecutor* v. *Lai Sien Kon* [1978] 2 M.L.J. 110.

CRIMINAL APPEAL.

P. Nainan for the appellant.

Saufee Afandi bin Mohamad (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

L.C. Vohrah J.: This is an appeal against an order of the Magistrates' Court committing the manager of the appellant-company to a term of imprisonment for his failure to pay arrears of contributions owed by it to the Employees Provident Fund Board after undertaking to do so by a certain date.

The materials facts are not in dispute. The appellant-company was on October 15, 1984, charged under section 16A(1)(c) of the Employees Provident Fund Act, 1951 on 24 counts for failing as an employer to remit contributions in respect of 4 employees. Its manager one A. Mutalib bin Selamat who was present on that day pleaded guilty to all the charges and a fine of $180/– was imposed for each charge. The total amount of the fines in the sum of $4,320/– was paid. The learned Magistrate upon the application by the prosecuting officer also made an order for the appellant-company to pay the arrears of contributions due to the Board. The arrears duly certified under the hand of the Accountant to the Board amounted to $28,325.00. The manager applied for time to pay this sum and the learned Magistrate allowed him two months, *i.e.* up to December 15, 1984, to do so. However on December 1, 1984, a receiving order was made against the appellant-company. The manager failed or was unable to pay the arrears and an application was made by the prosecution to have him committed to prison in default of payment. He was accordingly asked by the Court to show cause why he should not be committed. On April 23, 1985, he appeared in Court and explained that he had written to the Board asking for the arrears to be settled after the statutory meetings of the creditors and contributories with the Official Receiver. The hearing of the notice to show cause was then adjourned to May 22, 1985, on which date it was further adjourned to June 3, 1985, when submissions were made by the prosecuting officer. There were further adjournments and on the last adjourned date, June 29, 1985, the submissions of Counsel for the appellant-company and the reply of the prosecuting officer were heard. Finally on October 18, 1986, the learned Magistrate gave the order committing the manager to 10 months' imprisonment for default of payment of the arrears.

In her grounds of decision the learned Magistrate states that she acted –

(a) under section 16A(4) of the Employees Provident Fund Act in ordering the manager to pay the arrears of the contributions;

(b) under the specific provisions of section 283(i)(b)(1) of the Criminal Procedure Code (F.M.S. Cap. 6) in allowing him time to pay; and

(c) under the general provisions of section 283 of the Code in committing the manager to prison in default of payment of the arrears.

I shall now deal with the statutory provisions under which the learned Magistrate purported to have acted.

Section 16A(4) of the Act reads:

> "Upon being found guilty on any offence under paragraph (c) of subsection (1) of section 16(A) of this Ordinance, the Court before which the employer is found guilty *shall order such employer to pay to the Board the amount of any contributions,* together with any interest credited thereon, due and payable to the Board and certified by the Accountant of the Board to be due from such employer, prior to the date of such founding *(sic)* of guilty and such contributions *shall be recoverable in the same manner as a fine;* and any order made under this subsection shall be appealable as if it were an order for payment of compensation under section 426 of the Criminal Procedure Code."
>
> (Italics mine)

It is clear that the provisions of section 16A(4) are mandatory and they impose an obligation on the part of the Court to order the employer to pay the arrears upon conviction after certification by the Board's Accountant of the arrears owing prior to the date of the conviction. The provisions also stipulate that the arrears are recoverable in the way that a fine is recoverable.

The general provisions relating to sentences of fines including the specific manner in which they are recoverable are contained in section 283 of the Code and they read:

> "(i) *Where any fine is imposed under the authority of any law for the time being in force,* then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply (that is to say) –
>
> (a) where no sum is expressed to which the fine may extend the amount to which the offender is liable is unlimited, but shall not be excessive;
>
> (b) in every case of an offence in which the offender is sentenced to pay a fine the Court passing the sentence may, in its discretion, do all or any of the following things:
>
> (1) allow time for the payment of the fine;
>
> (2) direct payment of the fine to be made by instalments;
>
> (3) issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender;
>
> (4) direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sen-

tenced or to which he may be liable under a commutation of sentence:

Provided that where time is not allowed for the payment of such fine an order for imprisonment in default of payment shall not be issued in the first instance unless it appears to the Court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment;

(5) direct that such person be searched and that any money found on him when so searched or which, in the event of his being committed to prison, may be found on him when taken to prison, shall be applied towards the payment of such fine the surplus, if any, being returned to him:

Provided that such money shall not be so applied if the Court is satisfied that the money does not belong to the person on whom it was found or that the loss of the money will be more injurious to him than his imprisonment;

(c) the period for which the Court directs the offender to be imprisoned in default of payment of fine shall not exceed the following scale –

(1) if the *offence* is punishable with imprisonment:

Where the maximum term of imprisonment	*The period shall not exceed –*
does not exceed six months	the maximum term of imprisonment
exceeds six months but does not exceed two years	six months
exceeds two years	one quarter of the maximum term of imprisonment

(2) if the *offence* is not punishable with imprisonment:

Where the fine	*The period shall not exceed –*
does not exceed twenty-five dollars	two months
exceeds twenty-five dollars but does not exceed fifty dollars	four months
exceeds fifty dollars	six months;

(d) *(Omitted).*

(e) the imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law;

(f) if, before the expiration of the time of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the time of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate;

(g) the fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if under the sentence the offender be liable to imprisonment for a longer period than six years then at any time previous to the expiration of that period, and the death of the offender does not discharge from the liability any property which would after his death be legally liable for his debts.

(ii) A warrant for the levy of a fine may be executed at any place in the Federation, but if it is required to be executed outside the State in which it is issued it shall be endorsed for that purpose by a Judge or by a Magistrate of the First Class having jurisdiction in the State in which it is to be executed."

(Italics mine)

As I see it, section 283 of the Code provides, *inter alia,* guidelines to the Court for the imposition of a sentence of fine in the absence of any express provision relating to such a fine, for the realization or execution of a sentence of fine, and for the maximum period of imprisonment that can be imposed in default of payment of fine depending upon whether the offence for which the fine is imposed is punishable with imprisonment or not. The provisions of section 283(i)(b)(1), (2), (3) and (5) read together with those of section 16A(4) of the Act would therefore give the Court the power to recover arrears of contributions by allowing time for payment of the arrears or by enabling the arrears to be paid by instalments or by issuing a warrant for the levying of the amount of the arrears by distress and sale of any property belonging to the offender or by directing the offender to be searched and any money found on the offender to be applied towards the payment of the arrears. The specific provisions of section 283(i)(b)(4) and of section 283(i)(c), in my view, prescribe imprisonment in case of default of payment of a fine only when the offender has been in default of payment of a fine *per se, i.e.* a fine imposed as punishment for a particular offence, and then lay down a scale for the maximum term that can be imposed depending on whether the particular offence is originally punishable with imprisonment or not. These specific provisions cannot apply to arrears of contributions upon certification because they were not fines as such. In other words, the power to order a term of imprisonment in default of payment of fine is exercisable only when there has been a failure on the part of the offender to pay a fine imposed for a specific offence and the arrears of contribution in this case have not been imposed as a fine for a specific offence nor can they be construed as having been so imposed. I find support for this view in the case of *Public Prosecutor* v. *Lai Sien Kon*[1] where Ajaib Singh J. stated:

"It must be stressed here that the provisions in section 283 of the Criminal Procedure Code which provide for terms of imprisonment in default of payment of fines have no application in the recovery of a penalty ordered under section 13 of the Prevention of Corruption Act. The penalty is to be treated as a fine but only to the extent and for the purpose of its recovery as such and is not to be treated as a fine in default of which a term of imprisonment may be imposed."

In that case the accused pleaded guilty on two charges. The first charge was that he resold 17 cinema tickets which is an offence under Rule 8(3) of the Entertainments Duty Rules, 1953 and the second charge was that he had corruptly offered a gratification to wit $29/- to a police constable as an inducement for forbearing to do an act in relation to his principal's affairs, namely, refraining from taking action against the accused under the Rules, an offence under section 4(b) of the Prevention of Corruption Act, 1961. On the first charge he was fined $200/-, in default one month's imprisonment. On the second charge he was fined $500/-, in default four months' imprisonment. In addition he was ordered to pay $29/- by way of penalty to the Government of Malaysia, in default one week's imprisonment. The order to pay $29/- to the Government was made under section 13 of the Prevention of Corruption Act whose provisions relating to the recovery of a penalty are similar to those of section 16(A)4 of the Act with regard to the recovery of arrears of contributions. Section 13 of the Prevention of Corruption Act reads:

"Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within the time and to the body and in the manner specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the court, the value of that gratification, and *any such penalty shall be recoverable as a fine.*"

(Italics mine)

I agree with the reasoning of Ajaib Singh J. and it must *a fortiori* apply in the instant case where the arrears of contributions by their very nature constitute a civil debt and were not ordered to be paid by way of a penalty. In the result the appeal must be allowed and the order of committal made by the learned Magistrate is accordingly hereby set aside.

Appeal allowed.

Solicitors: *Philip Nainan & Co.*

PUBLIC PROSECUTOR v. ZAMIHIYAH

[O.Cr.J. (K.C. Vohrah J.) April 12, 1986]

[Temerloh – Criminal Trial No. 11 of 1984]

Penal Code, ss. 309A and 309B – Infanticide – Loss, suffering etc. – Sentence.

The prisoner caused the death of her only child aged 2 months by throwing it out of a moving car. She was found to be suffering from puerperal psychosis which persisted for 2 months after childbirth and was the cause of her act. She pleaded guilty to a charge under section 309A of the Penal Code. Evidence was adduced that she had waited for 8 years for a baby child, a baby girl. The court took consideration of her loss, suffering and the fact that she had been in prison since January 1983, for a period of 3 years 2 months and 19 days. She was accordingly sentenced to that period of imprisonment and when the court rose, she was set free.

CRIMINAL TRIAL.

Azhar bin Mohamed (Deputy Public Prosecutor) for the prosecution.

Prisoner in person.

K.C. Vohrah J.: The prisoner has lost her only child aged 2 months, born to her, through her own hands. She threw her baby out of a moving car and the baby died. Her illness, puerperal psychosis, a disease associated with childbirth and which persists for 2 months after childbirth, was the cause of her act. That act would have been murder which attracts the death sentence but the law of our country recognise this particular type of illness and the Public Prosecutor has accordingly amended the murder charge to one under section 309A punishable under section 309B of the Penal Code which attracts a maximum term of 20 years imprisonment. She has pleaded guilty to a charge for an offence under section 309A.

The prisoner waited 8 long years for the birth of her only child, a baby girl and she has now lost the child. She has suffered enough and I take that into consideration. I also take into consideration that the prisoner has been in prison since January 23, 1983, a period of 3 years 2 months and 19 days. I accordingly sentence her to a term of imprisonment of 3 years 2 months 19 days from the date of arrest. When the Court rises she is free to go.

Order accordingly.